No. 581

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL, OWEN READING AND W. J. BAYLEY, *Respondents.*

REPLY BRIEF OF PETITIONER.

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INDEX.

TABLE OF CASES.

STATUTES.

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Argument.

(Emphases herein are ours.)

Respondents correctly state that:

> "The determination of the question involved in the case at bar rests upon the correct construction and interpretation of Section 13 (b) (1) of the Fair Labor Standards Act of 1938 and Section 204 of the Motor Carrier Act of 1935." (Brief of respondents, p. 4)

The language of Section 13 (b) (1) of the Fair Labor Standards Act, clearly discloses it was the intention of Congress, in setting up the exemption thereby provided, that the provisions of Section 7 of the Fair Labor Standards Act (the overtime wage provisions) should not apply to "*any employee*" concerning whom the Interstate Commerce Commission has "*power*" to establish qualifications and maxi-

mum hours of service pursuant to Section 204 of the Motor Carrier Act, 1935.

It is also conceded by all parties hereto that respondents were employees of a private carrier of property by motor vehicle whose activities affected safety of operation (truck drivers); and that consequently Section 204 of the Motor Carrier Act gave the Interstate Commerce Commission authority to prescribe for them "maximum hours of service." The entire controversy herein, therefore, in its final analysis, turns on the determination of whether the word "power" in Section 13 (b) (1) of the Fair Labor Standards Act means what it says or whether it shall be restricted and interpreted to mean that such power did not exist in the Interstate Commerce Commission until it had, *pursuant to the power thus given it*, conducted a hearing and found a need for the Commission *to exercise* its power to prescribe maximum hours for employees of private carriers.

At the time the Fair Labor Standards Act was adopted the Interstate Commerce Commission had not put into effect regulations governing the maximum hours of service of employees of common and contract carriers *of property*, (11 M. C. C. 203) although it is conceded by respondents and by the Administrator of the Wage and Hour Division, who has filed a brief herein *amicus curiae*, that the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act *was applicable at all times to employees of common and contract carriers*. The sole basis for the contention that the application of the exemption should be postponed as to employees of private carriers lies in the fact that subparagraph (3) of Section 204 (a) of the Motor Carrier Act, contains the words "if need therefor is found," which words do not appear in subparagraphs (1) and (2) of said Section 204 (a) of the Motor Carrier Act. It is, therefore, contended by

counsel for respondents and by the Solicitor General, on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, that employees of private carriers of property by motor vehicle should be subject to the provisions of the Fair Labor Standards Act *until* the Interstate Commerce Commission found that a need existed for it to prescribe qualifications and maximum hours of service for such employees of private carriers.

It is first contended that the Motor Carrier Act, 1935, should be construed as not vesting in the Interstate Commerce Commission any authority to regulate employees of private carriers of property by motor vehicle until the Commission has made its finding of necessity. Certain decisions of this court are cited in support of this contention, namely:

United States v. *Baltimore & O. R. Co.*, 293 U. S. 454, 463;

Mahler v. *Eby*, 264 U. S. 32, 45; and

Atchison, Topeka and Santa Fe Ry. Co. v. *United States*, 295 U. S. 193, 202.

These decisions when carefully analyzed we submit do not support this contention. On the contrary, they hold that when *the exercise* of delegated legislative authority is conditioned upon the existence of certain conditions the body to which the authority is delegated must, *as a condition precedent to the right to exercise its authority*, find the existence of the conditions upon which its "power" or authority is to be exercised.

Secondly, it is contended that the exemption provided by Section 13 (b) (1) was adopted not for the purpose of freeing the hours of the employees therein referred to from regulation, but for the purpose of avoiding overlapping or conflicting regulation by different governmental agencies. Undoubtedly the purpose of Congress in placing in the Fair Labor Standards Act the exemption contained in Section 13

(b) (1) was to avoid conflicting authority. However, we think it evident, from the plain meaning of the language used in this exemption, that Congress intended to deny to the Administrator of The Fair Labor Standards Act *any authority* over *any employee* as to whom the Interstate Commerce Commission *has power* to establish maximum hours of service pursuant to the Motor Carrier Act. It seems to us that the language of the exemption could not have been more clear and specific. If Congress had intended to exempt only those employees for whom the Interstate Commerce Commission had actually prescribed regulations or might thereafter prescribe regulations it would have been most obvious and most simple for the Act to have said that those employees as to whom the Interstate Commerce Commission has prescribed regulations shall be exempt. It did not do that, however. It said that those employees with respect to whom the Interstate Commerce Commission has "*power to establish qualifications and maximum hours of service*" shall be exempt from the overtime wage provisions of the Fair Labor Standards Act. The language itself is so plain and so simple that it seems to us it needs no construction. The purpose of the exemption we submit is also perfectly apparent. It was not to prevent conflicting regulations but it was to prevent two agencies having the power or the right to regulate the hours of these particular employees; to avoid any possible *conflict of jurisdiction* between the two (2) agencies of government to-wit, the Interstate Commerce Commission and the Wage and Hour Division of the United States Department of Labor, concerning those employees over whom the Interstate Commerce Commission *might*, at any time, exercise its authority to establish maximum hours of service. This construction is in harmony with the statement of the Chairman of the Senate Committee quoted on page 10 of the administrator's brief, to wit:

"'It was the policy of the committee, *in cases where regulation of hours and wages are given to other governmental agencies,* to write the bill in such way as not to conflict with such regulation.' 81 Cong. Rec. 7875 (1937)."

Section 204 (a) (3) of the Motor Carrier Act most certainly gave to another governmental agency the authority to regulate the maximum hours of service of employees of motor carriers. It is true these regulations as to employees of private carriers were to be prescribed by the Interstate Commerce Commission only "if need therefor is found." It is, however, to be presumed that the Interstate Commerce Commission would exercise its authority whenever such need was found to exist. In any event it cannot be properly said that the Interstate Commerce Commission had not been given the *power or right to regulate* the hours of service of employees of private carriers. It is, therefore, clear, it seems to us, both from the language of the act itself and from the congressional history thereof that it was intended to exempt all such employees from the provisions of Section 7 of the Fair Labor Standards Act.

The exemption was not based upon the question of whether the Interstate Commerce Commission had or had not exercised its jurisdiction or power but it was clearly and concisely stated so as to cover all employees whose hours the Interstate Commerce Commission *might,* under any conditions regulate by virtue of the powers and duties vested in the Interstate Commerce Commission pursuant to the Motor Carrier Act.

Thirdly, it is contended that it was the purpose of the Fair Labor Standards Act to include within its jurisdiction every employee engaged in interstate commerce or in the production of goods for interstate commerce except those specifically exempted and that the coverage of the Fair

Labor Standards Act must be liberally construed, because it is a remedial statute, and the exemptions thereof strictly construed. We have no quarrel with this principle of construction. It is supported by the decisions of this Court, including the decision of this court in the case of *McDonald* v. *Thompson*, 305 U. S. 263-266, which case holds *that the Motor Carrier Act of 1935 is a remedial statute and is, therefore, to be construed liberally.* This contention, however, does not answer the question. A strict construction of the exemption provided by Section 13 (b) (1) does not mean that the plain language of the exemption is to be disregarded. It must be given its proper effect and the exemption must be applied to those employees who come within its terms.

The applicable rule is concisely stated in *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th Cir.) in the following language:

> "The meaning of the statute must in the first instance at least be sought in its language, and *if that is plain and the act is constitutional, the sole function of the court is to enforce it. Caminetti* v. *United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442, L. R. A. 1917F 502, Ann. Cas. 1917B, 1168. If the statutory meaning is clear, there is, of course no occasion to resort to rules of construction."

No reason or authority has been advanced or cited in the brief of respondents nor in the brief of the administrator, *amicus curiae*, for the proposition that the Interstate Commerce Commission *had no power* to regulate the hours of employees of private carriers of property by motor vehicle at the time of the passage and approval of the Fair Labor Standards Act of 1938. True, it is suggested that this power should be held not to come into being until the Commission found the existence of the conditions upon which it was its *duty* to make the regulations, but that construction fails to give the language of the exemption its plain meaning.

This Court has many times held that the constitutional power vested in the Congress of the United States over Interstate Commerce gives Congress the right to regulate not only interstate transactions themselves but the authority to regulate production with a view to interstate transportation of the product. *Cloverleaf Butter Company* v. *Patterson*, 315 U. S. 148-179. Congress does not exercise its power to regulate the production of goods which are to be transported in interstate commerce until it first finds that the conditions under which these goods are being produced adversely affects interstate commerce. Yet, *it would not be contended that Congress did not have such power at all times.* It does have such power. Its *exercise of the power* is dependent upon the occurrence of conditions which necessitate its use. So, in the instant case, at all times after the passage of the Motor Carrier Act of 1935, the Interstate Commerce Commission *had the power* to regulate the maximum hours of service of the respondents in this case; it is true it could not exercise that power until it found that there was *a need for its use, but that did not affect the existence of the power.*

Fourthly, it is contended that the decision of the Eighth Circuit Court of Appeals accords with the administrator's interpretation (Interpretative Bulletin No. 9, par. 5) of Section 13 (b) (1). The equivocal nature of the administrator's interpretation of Section 13 (b) (1) as set forth in Interpretative Bulletin No. 9, together with the fact that the administrator failed to appeal from a District Court decision "otherwise" interpreting the said exemption has been heretofore pointed out in the original brief of petitioner, pages 14-15. In addition thereto we submit that the language of the exemption is unambiguous and under those circumstances the terms of the same cannot be enlarged or diminished by rulings of the administrator. In *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90, the Circuit Court of Appeals of the Fifth Circuit, in an opinion written by Circuit Judge

HUTCHESON, in discussing another provision of the Fair Labor Standards Act exempting certain employees said:

> "The act is unambiguous and operates to exempt all those coming within its terms *and those terms cannot be enlarged or diminished by rulings of the Administrator.*"

The following language from the opinion of Mr. Justice REED, in *United States* v. *American Trucking Association*, 310 U. S. 534-553, is particularly applicable to the interpretation of the exemption in controversy:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. *In such cases we have followed their plain meaning.*".

Conclusion.

It is, therefore, respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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